APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 12430

SIERRA PACIFIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY, INTERVENOR

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Decided February 24, 1955

Mr. William C. Chanler, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Mr. Lawrence A. Baker* was on the brief, for petitioner.

Mr. Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission, with whom *Mr. Willard W. Gatchell,* General Counsel, Federal Power Commission, was on the brief, for respondent.

Mr. F. T. Searls, of the bar of the Supreme Court of California, *pro hac vice,* by special leave of Court, with whom *Mr. Robert E. May* was on the brief, for intervenor.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges

BAZELON, *Circuit Judge:* In 1938, Pacific Gas and Electric Company, a public utility under the

laws of California, and Part II of the Federal Power Act,[1] entered into its second 15-year contract to sell electric energy to Sierra Pacific Power Company, a public utility under the laws of California and Nevada. With the end of World War II, it became apparent that before expiration of this contract in 1953 Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by P G & E, or the development of a new source of power. Accordingly, in 1947 Sierra commenced negotiations with P G & E and the Bureau of Reclamation which offered to furnish power from Shasta Dam.

At first P G & E offered a 15-year contract at the 1938 contract rates but with an "escalator fuel clause." Sierra rejected this and turned to intensive negotiations with governmental agencies for "cheap Government power." P G & E then proposed a lower rate (the so-called P–31 schedule) for the same term without the escalator clause. This proposal was accepted in June 1948 and embodied in a contract which was duly filed with the California Public Service Commission and the Federal Power Commission. The P–31 schedule was a lower rate approved by the California Public Service Commission (formerly Railroad Commission) to enable P G & E to retain business of customers that would otherwise "be lost altogether" to public power competition. But a significant condition of this approval was that any loss from such service would be borne

[1] 49 Stat. 847 *et seq.* (1935), 16 U. S. C. § 824 *et seq.* (1952).

by P G & E's stockholders and not by its other customers.

In 1952, however, when public power from Shasta Dam was no longer available to Sierra, P G & E sought the California Commission's approval for rate increases for Sierra and other customers under the P–31 schedule.[2] The Commission refused on the ground that the special contracts were entered into "in order to forestall alleged government competition and with the clear understanding that its stockholders must bear any burden * * *." In February 1953, in a further effort to increase its rates, P G & E filed the schedule of increased rates in question here with the Federal Power Commission under § 205 of the Federal Power Act.[3] Sierra thereupon intervened. It urged that § 205, which provides for Commission approval of newly proposed rates merely upon a finding that they are reasonable, is not applicable where, as here, approval would effect unilateral abrogation of a duly filed rate contract; that to effect such abrogation the Commission must first make the determination, provided for in § 206 (a), that the rate contract to be superseded is "unjust, unreasonable, unduly discriminatory or preferential * * *".[4] The Federal Power Commission rejected this contention by a vote of three to two and approved the increased rates upon a finding, under § 205, that they were reasonable. Sierra brought this petition to review the Commission's action.

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[2] With the significant exception of one city which still could have utilized Shasta Dam power.

[3] 49 Stat. 851 (1935); 16 U. S. C. § 824d (1952).

[4] 49 Stat. 852 (1935), 16 U. S. C. § 824e (a) (1952).

The novel and important question for decision is whether and to what extent the preexisting right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates. Congress did not expressly abrogate that right. To find such abrogation by implication,

> * * * we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.[5]

So guided, we examine the pertinent provisions of the Act.

Section 205 (a) of the Federal Power Act requires that rates for the sale of electric energy within the Commission's jurisdiction shall be "just and reasonable." Section 205 (c) provides that all rates, charges and contracts relating thereto shall be filed with the Commission. Section 205 (d) provides that no change in such filed rates, charges, or contracts relating thereto shall

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[5] *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437 (1907). Cf. *Federal Power Comm'n.* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 252–53 (1954), where the Court remarked: "To convert this Act from a regulatory Act to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose."

be made without notifying the Commission. Section 205 (e) authorizes the Commission, upon complaint or upon its own motion, to determine whether the newly proposed rate or charge is just and reasonable. In modifying a filed rate under § 205, it is not necessary to prove that the original rate is unjust or unreasonable; the new rate will take effect if the utility sustains the burden of proving that it is "just and reasonable."[6]

Under § 206 (a), on the other hand, a finding of unreasonableness *is* a prerequisite to modification of a filed rate. That section authorizes the Commission, upon its own motion or upon complaint, to find that a rate, or contract affecting such rate, is "unjust, unreasonable, unduly discriminatory or preferential." If it so finds, it must determine and fix a "just and reasonable rate, charge * * * or contract * * * to be thereafter observed * * *."[7]

The Commission argues that under both §§ 205 and 206 (a) "the statutory scheme is to depend upon regulatory action and initiative in lieu of private contract to protect the buyers' interests—in the public interest." But we think this stretches the statutory scheme too far. The Act's primary aim is that only just and reasonable rates shall be charged. Since "statutory reasonableness is an abstract quality represented by an area rather than a pinpoint,"[8] the statutory purpose may be satisfied by more than one rate. Clearly, if con-

[6] 49 Stat. 852 (1935), 16 U. S. C. § 824d (e) (1952).

[7] 49 Stat. 852 (1935), 16 U. S. C. § 824e (a) (1952).

[8] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251 (1951).

tract rates are reasonable, the public interest does not require allowance of higher rates upon the unilateral application of the seller under § 205, just because the Commission deems the higher rates also to be reasonable. Therefore, it does not "deprive the statute of its efficacy" to give effect to a duly filed rate contract until such time as the rates specified therein are found unreasonable under § 206 (a).

We cannot agree with the Commission that this view of the statutory scheme is inconsistent with § 205's requirement that contracts and notice of any changes therein shall be filed with the Commission.[9] Regarding a comparable requirement in a Kansas statute, the Supreme Court said, "The consent of the Commission * * * is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of schedules."[10] Obviously the mere fact that two parties have agreed upon a rate, or to a change therein, does not effect an exemption from regulation. We think these references contemplate continued use, rather than abandonment, of rate contracts.

Our view of the statutory scheme is supported by a recent Third Circuit case, *Mobile Gas Service Corp. v. Federal Power Comm'n.*,[11] and the authorities therein relied upon. Although the case arose under the Natural Gas Act, §§ 4 and 5 (a) of that Act correspond almost verbatim

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[9] 49 Stat. 851 (1935), 16 U. S. C. § 824d (c) and (d).

[10] *Wichita R. R.* v. *Public Utilities Commn.*, 260 U. S. 48, 56-57 (1922).

[11] 215 F. 2d 883 (3d Cir. 1954).

with §§ 205 and 206 (a) of the Power Act.[12] There, as here, the Commission had abrogated a preexisting contract without any finding that the contract rate was unreasonable. With one judge dissenting, the Court of Appeals, in a carefully considered opinion, reversed the Commission's order. The court relied upon: (1) cases arising under the Public Utility Law of Kansas which contained provisions similar to §§ 4 and 5 (a) of the Natural Gas Act;[13] (2) the interpretation of the Gas Act adopted by the Court of Appeals for the Tenth Circuit in *Colorado Interstate Gas Co.* v. *Federal Power Commn.*;[14] (3) the doctrine

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[12] The Commission urges that the Mobile case differs from the present case in that the Commission was powerless under § 4 (e) of the Gas Act to suspend the proposed increase pending determination of its reasonableness. While such a distinction exists, it was in no way determinative.

[13] The Supreme Court of Kansas, in *Kaul* v. *American Independent Telephone Co.*, observed: "The passage of the Act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon * * * *rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates.*" 95 Kans. 1, 4 (1915). [Emphasis supplied.]

This view of the Kansas statute was embraced by the Supreme Court of the United States in *Wichita R. R.* v. *Public Utilities Commn.*, 260 U. S. 48 (1922), and by the Court of Appeals for the Tenth Circuit in *Allen W. Hinkel Dry Goods Co.* v. *Wichison Industrial Gas Co.*, 61 F. 2d 881 (10th Cir. 1933).

[14] 142 F. 2d 943, 954 (10th Cir., 1944), *affirmed*, 324 U. S. 581 (1945), where the Court said: "The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had

that common law rights will not be impaired without a clear authorization;[15] (4) a colloquy at hearings on a predecessor bill;[16] and (5) the significant lack of debate on the question in view of the drastic impact wholesale abrogation of contracts would have had on the natural gas industry.[17] These grounds apply here.

Cases relied on by the Commission do not sustain its position. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, which the Commission asserts

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agreed. *Such rates and charges could be modified only after a finding of unreasonableness.*" [Emphasis supplied.]

[15] Citing *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); and *Federal Power Commn.* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239 (1954).

[16] Since the provisions in question were virtually identical with those of the Power Act, which were already in operation, the witness' understanding of their meaning is pertinent here. That colloquy reads as follows:

"Mr. HALLECK. Of course, it is your idea that if this bill should pass and the Commission be given the authority contemplated in this bill, that the contract could be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?

"Mr. BOOTH. That certainly would be my position and we certainly would ask the Federal Power Commission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an unfair return from the fair value of its property." *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4008*, p. 43, 75th Cong., 1st Sess. (1937).

This clearly suggests the understanding that contracts would remain in force unless they were "earning an unfair return * * *," *i. e.*, were unjust and unreasonable.

[17] We have been referred to no pertinent legislative history of the Federal Power Act, nor have we been able to find any discussion of the present problem in either the debates or committee reports.

is inconsistent with the *Mobile* case, expressly withheld any opinion as to the correctness of that decision.[18] *Midland Realty Co.* v. *Kansas City Power & Light Co.* upheld the constitutionality of the procedure adopted here by the Commission, but did so "upon the construction that the [Missouri] supreme court put upon the statute."[19] Obviously, in construing the Federal Power Act, we are not bound by the Missouri court's construction of its statute.

Although the Commission has at all times insisted that no finding of unreasonableness is required, the majority opinion approving the increase stated:

> * * * if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful. For none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum P G & E is willing to accept.

This statement, however, is based entirely upon a record made in a proceeding under § 205 (e) in which the unreasonableness of the contract rate was not in issue. And, in any event, as the dissenting Commissioners observed, "no such finding is made. Rather, it seems to have been carefully avoided."

For the foregoing reasons, the order under review is set aside and the case remanded to the

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[18] 217 F. 2d 73, 78 (5th Cir. 1954).

[19] 300 U. S. 169, 113 (1937).

Commission with instructions either to dismiss the proceeding or for further proceedings under § 206 (a).

So ordered.

United States Court of Appeals for the District of Columbia Circuit

January Term, 1955

No. 12430

SIERRA PACIFIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY, INTERVENOR

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges

Decree

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered and decreed by this Court that the order on review in this case be, and it is hereby, set aside, and that this case be, and it is hereby, remanded to the said Federal Power Commission for further proceedings in conformity with the opinion of this Court.

Dated February 24, 1955.

Per Circuit Judge BAZELON.

Filed February 24, 1955.

United States Court of Appeals for the District of Columbia Circuit

January Term, 1955

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FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY, INTERVENOR

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges, in Chambers

Order

Upon consideration of petitioner's motion to amend the last paragraph of the opinion of this Court, entered herein February 24, 1955, of the answer thereto filed by intervenor, and of the objections to said motion filed by respondent, and of petitioner's reply to said answer and objections; it is

Ordered by the Court that the aforesaid motion be granted and that the last paragraph of the opinion be, and it is hereby, amended to read as follows:

> For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under § 206 (a).

PER CURIAM.

Dated March 23, 1955.

APPENDIX B

The Federal Power Act, as added by 49 Stat. 838, 16 U. S. C. 791a *et seq.*, reads in pertinent part as follows:

> *Sec. 205.* * * * (c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
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> (d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall

take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may

by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 206. (*a*) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.